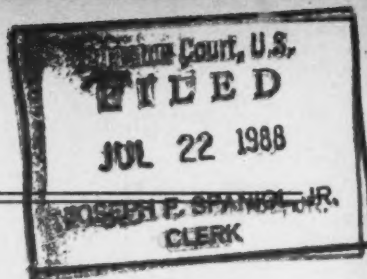


(2)
No. 87-2099



IN THE

Supreme Court of the United States

October Term, 1987

JAMES LOUDERMILL,
Petitioner,

vs.

CLEVELAND BOARD OF EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OPPOSING PETITION FOR CERTIORARI

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I.

PARTIES

The Plaintiff-Appellant in the proceeding in the Court of Appeals was James Loudermill. The Defendant-Appellee in the Court of Appeals was the Cleveland Board of Education.

II.

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OPINIONS BELOW

On October 17, 1986, the United States District Court for the Northern District of Ohio entered its Memorandum Opinion and Order in favor of Respondent Cleveland Board of Education. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit and on April 6, 1988 said Court affirmed the decision of the District Court. Both opinions are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

This case was originally filed on October 27, 1981 in the United States District Court for the Northern District of Ohio. At the time of filing, Petitioner also filed a Motion to Proceed *in forma pauperis* asserting he was unable to pay the fees for the filing of the case. Jurisdiction was invoked under Title 28 U.S.C. §1343(3) and (4).

On November 6, 1981, the District Court *sua sponte* dismissed the complaint for failure to state a claim on which relief could be granted and denied Petitioner's motion for leave to proceed *in forma pauperis*. This was done prior to any service upon Respondent Cleveland Board of Education. On November 17, 1983, the Sixth Circuit Court of Appeals affirmed the Court's dismissal of "that part of (the complaint) which alleged that delays in post-termination hearings violated (Loudermill's) due process rights" but vacated and remanded "that part of the District Court's judgment that dismissed the pretermination procedural due process claim." *Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 564 (1983). The United States Supreme Court affirmed the Sixth Circuit's decision and remanded the case for further proceedings. *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985).

Upon remand Respondent Cleveland Board of Education for the first time had the opportunity to file its Answer and asserted the defense that Petitioner Loudermill had in fact received all process due him in his termination. After a full trial and on October 17, 1986, the District Court found in favor of Respondent Cleveland Board of Education on all issues.

On April 6, 1988, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision.

Petitioner thereafter filed the instant Petition for Certiorari seeking to overturn the opinions of the District Court and the United States Court of Appeals for the Sixth Circuit.

FACTS

In September, 1979, the Board hired Petitioner Loudermill as a nighttime security guard. On his job application, he indicated that he had never been convicted of a felony. In October, 1980, as part of a routine examination of employment records, the Board discovered that he had a felony conviction.

After Mr. Thomas Roche, Loudermill's supervisor, learned of Loudermill's conviction, he summoned him to his office. On or about October 27, 1980, Loudermill met with Roche.

At the meeting, Roche informed Loudermill of Loudermill's conviction. Roche showed him a Cuyahoga County Sheriff's Report, containing information that Loudermill had been indicted in 1968 for a burglary of an inhabited dwelling and sentenced to six months in the workhouse, and Loudermill's employment application in which he had answered "No" to the question, "Have you ever been convicted of a crime (felony)?" Roche asked Loudermill to explain the apparent falsehood on the employment application. Loudermill stated during the meeting that he believed his conviction was for a misdemeanor, not a felony.

Roche then informed Loudermill that he could no longer work as a nighttime security guard because, as a felon, he was not permitted to carry a gun. According to Loudermill, Roche offered him a daytime job and gave him until the end of the week to decide whether to accept

it, resign, or be discharged. Further, Loudermill was given until the end of the week to produce any evidence in support of his statement that he was convicted of a misdemeanor.

Loudermill did not contact Roche after that meeting. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill of his dismissal because of dishonesty.

Thereafter, the instant case was filed.

REASONS FOR DENYING CERTIORARI

1. DUE PROCESS WAS SATISFIED BY THE PROCEDURES USED WHICH WERE CONSISTENT WITH LAW OF THE INSTANT CASE AS WELL AS CASE LAW IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner attempts to assert that the procedural due process granted to Petitioner James Loudermill was insufficient because the ultimate decision-maker, the seven member Board of Education, was not directly involved in his pretermination hearing.

Petitioner's argument is not well founded. As a practical matter, the use of a subordinate at the pretermination stage of proceedings is the only manner in which an initial check against a mistaken decision can be made.

To require the full Board to meet especially to consider the pretermination position of the Petitioner would expand this Court's ruling and make the entire process of initiating the termination of an employee burdensome and unworkable.

As stated by the Supreme Court in the instant case:

"The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." (Emphasis supplied.)

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1496 (1985).

Petitioner has received all process due him by Respondent Cleveland Board of Education. As stated by the United States District Court in its Memorandum of Opinion and Order finding in favor of Respondent Cleveland Board of Education:

"As a tenured public employee, Loudermill was entitled to a pretermination hearing." *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1495 (1985). The pretermination hearing 'need not be elaborate', *Id.*, but must give the employee 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.' *Id.*" (Petitioner's Appendix A24).

The United States District Court, after hearing testimony and taking evidence, found the evidence adduced at trial established that Loudermill had adequate notice of the charges against him. The Court further found that during the meeting, Loudermill was afforded an opportunity to explain the charges against him and he did. The Court concluded that:

"Since Loudermill received adequate notice of the charge against him, saw the Board's evidence, and was offered several days to respond, the Court concludes that Loudermill received a pretermination hearing which satisfied the requirements of due process.

Accordingly, the Court finds for the Defendant."

Memorandum of Opinion of United States District Court, dated October 17, 1986, p. 5 (Petitioner's Appendix A28).

Further, the Sixth Circuit has, in the cases of *Lee v. Western Reserve Psychiatric Rehabilitation Center*, 747 F.2d 1062 (6th Cir. 1984), and *Gurish v. McFall*, 801 F.2d 225 (6th Cir. 1986), determined that meetings or interviews with supervisors of the nature and scope of Petitioner's are sufficient pretermination process and

satisfy the constitutional requirements of due process. See, also, *Kelly v. Smith*, 764 F.2d 1412 (11th Cir. 1985), *Vrasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985), *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985), *Derych v. Akron City School District*, 633 F. Supp. 1180 (1986).

The Petition for Certiorari should be denied.

2. CONFRONTING AN EMPLOYEE WITH EVIDENCE AGAINST HIM AND GIVING HIM 4-5 DAYS TO RESPOND IS NOT "SUCKER PUNCHING" HIM.

This Court required, in its decision in the instant case *Cleveland Board of Education v. James Loudermill*, *supra*, that a government employee with a protected property interest must receive, at a minimum, "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." See, United States District Court Memorandum of Opinion (Petitioner's Appendix A24).

Petitioner now asserts that the pretermination hearing is somehow equated to a pugilistic "sucker punch". Nothing could be farther from the truth.

The United States District Court found:

"... he [Loudermill] was given 4 or 5 days to expand on or to supplement his explanation. He did not do so. The time provided to Loudermill during and after the meeting with Roche constituted a sufficient opportunity to respond to the changes."

United States District Court Memorandum of Opinion (Petitioner's Appendix A26, A27).

The District Court has made this finding of fact. The evidence is clear. No "sucker punch" occurred. No issue presents itself for this Petition for Certiorari. The Petition for Certiorari should be denied.

3. THE WEIGHT OF EVIDENCE CLEARLY SUPPORTS THE DECISION OF THE UNITED STATES DISTRICT COURT.

Petitioner James Loudermill was granted a pretermination hearing that comported with the due process requirements of the United States Constitution.

The District Court addressed each and every issue in considering the evidence submitted and found in favor of the Respondent Cleveland Board of Education. The evidence was overwhelming that a pretermination hearing was held.

Mr. Thomas Roche, a former policeman, Director of Safety and Security and presently a Court Administrator for the Common Pleas Court, Domestic Relations Division, Cuyahoga County, Ohio, testified that he met with Mr. Loudermill, showed him the sheriff's record of his conviction for a felony and gave him an opportunity to respond to the charges.

Mr. Roche's testimony was found to be credible by the United States District Judge. Mr. Loudermill corroborated Mr. Roche's testimony that a meeting was held, documents shown him, and that he offered an explanation for his actions to Mr. Roche.

Each requirement of a pretermination hearing was thus addressed at trial, evidence and testimony were submitted by both parties, and the United States District Judge made the factual determination that the due process requirements as enunciated by the Supreme Court of the United States in the *Loudermill* decision were met.

The District Court found specifically that:

"Since Loudermill received adequate notice of the charge against him, saw the Board's evidence, and was offered several days to respond, the court

concludes that Loudermill received a pretermination hearing which satisfied the requirements of due process."

Substantial evidence including the direct testimony of the *Petitioner* supports the District Court's decision. Therefore, the Petition for Certiorari should be denied.

4. ARGUMENTS MADE ON APPEAL BEFORE ANY PLEADING IS FILED BY A PARTY ARE NOT EVIDENCE AND DO NOT PRECLUDE SAID PARTY FROM RAISING EACH AND EVERY DEFENSE AVAILABLE TO IT AT ITS FIRST OPPORTUNITY.

Notice of the appeal by Petitioner James Loudermill of the original United States District Court's Order denying leave to proceed *in forma pauperis* was received before service of any complaint upon the Respondent Cleveland Board of Education. The appeal by Petitioner James Loudermill thus contained a record of only his complaint and the District Court's denial of leave to proceed *in forma pauperis* along with an opinion determining that Petitioner's complaint failed to state a claim upon relief could be granted. No answer as of that time had been filed by the Board of Education.

It is a basic tenet of law that on appeal the parties are limited to the record in the Court below. Unfortunately for the Respondent Cleveland Board of Education there was no record which represented its position concerning its defenses to Petitioner's complaint. The arguments made by the Respondent Cleveland Board of Education on appeal and in the United States Supreme Court were arguments based upon the decision of the United States District Judge in his original dismissal of Petitioner's complaint.

Upon remand by the United States Supreme Court to the United States District Court in the Northern District of Ohio, Respondent Cleveland Board of Education filed its answer and raised, at this, its first opportunity, the defense that it had granted Petitioner James Loudermill all process that was constitutionally due him.

Since Petitioner has consistently argued that he has been denied due process, it is peculiar at this stage of the proceedings that said Petitioner now wishes to deprive Respondent Cleveland Board of Education of its due process, *i.e.*, its right to file an answer when finally served with his complaint. Petitioner Cleveland Board of Education properly raised all of its defenses at its first opportunity and Petitioner's argument is totally without merit.

Petitioner's citation to previous briefs submitted by Respondent Cleveland Board of Education are obviously not evidence. The Cleveland Board of Education was arguing on the record that was submitted to the Courts, which record did not contain any defenses of the Cleveland Board of Education but merely the determination of the United States District Court.

Petitioner himself states the appropriate law which requires that a defendant must assert all of his defenses at the first opportunity. Petitioner asserts that Respondent has waived its rights to assert new defenses. Respondent respectfully submits that until this Court remanded the instant case to the District Court it had never raised *any* defenses nor filed *any* responsive pleading.

Justice, fairness and equity all dictate that Petitioner's argument be found to be without merit and his Petition for Certiorari denied.

CONCLUSION

For the reasons set forth above, Respondent respectfully asserts that the Petition for Certiorari should be denied.

Respectfully submitted,

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